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No. 94-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ILLINOIS STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

DENNIS J. HASTERT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in congressional redistricting litigation involving a state defendant a plaintiff having been found to be a "prevailing party" should be denied an award of attorneys fees merely because the state defendant affirmatively chose to assume a passive role in the litigation.

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These joint respondents, Wilfredo Nieves, Al Johnson, Linda Coronado, Bobby Rush, Jesus Garcia, Reverend Willie Barrow, Rafael Boria, Miguel Del Valle, Robert L. Lucas, Leon D. Finney, Jr., Reverend Clay Evans, Joseph Gardner, Luis V. Gutierrez, Regner Suarez, Joseph Berrios, Miguel A. Santiago and Neomi Hernandez (hereinafter *Nieves* Plaintiffs), and the Chicago Urban League, Craig R. Collins, Mark Allen and Nikolas C. Theodore (hereinafter *Urban League* Plaintiffs), respectfully pray that the Petition for Writ of Certiorari filed by the Illinois State Board of Elections to review the decision of the Seventh Circuit Court of Appeals be denied.

STATEMENT OF THE CASE

Following the release of the 1990 census data, the United States House of Representatives informed the Governor of Illinois that due to population changes reflected in the census that Illinois was entitled to only 20 representatives, as opposed to the 22 representatives serving in Congress. Under the provisions of the State's Constitution, the Illinois General Assembly was charged with the obligation of implementing a constitutionally sound congressional redistricting plan by June 30, 1991. The Illinois General Assembly failed to formulate any redistricting plan.

The Congressional Redistricting Action

Separate suits filed by the *Nieves* Plaintiffs and the *Urban League* Plaintiffs were consolidated with other lawsuits into one federal action challenging the Illinois Congressional District plan. The *Nieves* Plaintiffs and the *Urban League* Plaintiffs specifically challenged the legality of the existing reapportionment plan under the requirements imposed by the Federal Constitution and Section Two of the Voting Rights Act, 42 U.S.C. §1973. Both the *Nieves* Plaintiffs and the *Urban League* Plaintiffs sought the creation of a Hispanic majority congressional district while at the same time retaining three African-American majority congressional districts within the state of Illinois. Although the petition filed by the Illinois State Board of Elections indicated that "redistricting would have a potential impact on . . . the contours of African-American districts in proximity to the new Hispanic 'super-majority' district", this is not an accurate assessment of the congressional redistricting action. Petition at 3.

The three African-American districts existing at the time suit was filed were not threatened by the ultimate forma-

tion of a Hispanic "super-majority" district. The real threat to the three existing African-American districts was the potential for dilution of these majority districts due to the State's failure to fulfill its obligation to the citizens of Illinois by not redistricting the state. The Hispanic district created as a result of this congressional redistricting action was not by any measure the offspring of State action, but rather was born solely from the efforts of counsel for these respondents to provide the Hispanic community of Illinois with appropriate representation in the U.S. Congress. Any unbridled redistricting within the state of Illinois threatened the three African-American majority districts created in 1981, and further threatened any potential for the creation of a majority Hispanic district within the state.

Petitioner is correct in stating that the Illinois General Assembly did not redistrict Illinois before adjourning in July of 1991. In fact, the Illinois General Assembly has failed to conduct a post-census redistricting for more than a quarter of a century. The 1981 court ordered districting referred to in the petition is merely one of several examples where the citizens of this state have taken affirmative steps to redistrict where the State's General Assembly failed to formulate a plan.

During pretrial proceedings, the District Court denied the Illinois State Board of Elections and its members' (collectively referred to hereafter as the "State Board") motion to dismiss the claims against it on the grounds that the State Board "remained a necessary nominal defendant because it was obligated under the terms of the order issued in *In Re: Congressional District Reapportionment Cases*, No. 81 C 3915, Slip Op. (N.D. Ill. November 23, 1981), to conduct the forthcoming 1992 congressional elections under the 1981 congressional district plan until we (the Court) issue a superseding order." *Hastert v. State Board of Elections*, 777

F.Supp. 634, 637, 639 (N.D. Ill. 1991) (three judge panel). Additionally, the District Court panel did grant the State Board's unopposed motion that it be permitted to abide by the judgment resulting from these proceedings without providing a defense or adopting an adversarial role *Id.* Accordingly, the State Board's level of participation in this litigation was charted by the Attorney General for the State of Illinois, and not by either the Court or the various plaintiffs.

Efforts of the *Nieves* Plaintiffs and *Urban League* Plaintiffs went well beyond the "settling of differences among themselves to narrow or remove issues". Petition at page 7. These plaintiffs, and not the State of Illinois, drafted several alternatives for redistricting the state. These plaintiffs, and not the State of Illinois, crafted three majority African-American districts of such proportions which recognized the gains achieved by the African-American community in the 1981 redistricting litigation. These plaintiffs, and not the State of Illinois, crafted for the first time a majority Hispanic congressional district within Illinois.

On November 6, 1991, the District Court held that the existing congressional district plan was unconstitutional and ordered defendant State Board to implement the congressional reapportionment plan proposed by, among others, the *Nieves* and *Urban League* Plaintiffs. This reapportionment plan created a Hispanic majority congressional district and further allowed for the maintaining of three African-American majority congressional districts (although the boundaries of these districts were altered). In its opinion, the District Court ordered all parties to "bear their own costs," which in effect denied those parties who prevailed an award of attorneys fees under the applicable fee shifting statutes.

Attorneys' Fees

The *Nieves* and *Urban League* Plaintiffs, along with others, filed timely motions under Federal Rule of Civil Procedure 59(e) to amend the Court's judgment to see that of attorneys' fees were rightfully awarded. On January 17, 1992, the District Court denied the *Nieves* Plaintiff's motion on the grounds that although they were "prevailing parties" for the purposes of the fee shifting statutes, there were "special circumstances" which precluded an award of attorneys' fees. The District Court denied the *Urban League* Plaintiff's motion on the grounds that they were not a "prevailing party" for purposes of the fee shifting statute. The *Nieves* and *Urban League* Plaintiffs filed a timely appeal from the District Court's judgment.

On December 17, 1993, a panel from the United States Court of Appeals for the Seventh Circuit, with one judge descending, reversed the District Court's decision to deny attorneys' fees to the *Nieves* Plaintiffs (and others). Petitioner's Appendix at 30-53. The December 17, 1993 opinion of the Seventh Circuit failed to include the *Urban League* Plaintiffs in an award of attorneys' fees. The *Urban League* Plaintiffs filed a Petition for Rehearing.[1] On June 1, 1994, the Seventh Circuit panel, with one judge dissenting, issued an opinion granting the *Urban League*'s petition and denying the State Board's petition and further finding "that the reasons given by the District Court for denying fees to the prevailing parties in this case were inadequate." *Hastert v. Illinois State Board of Election Commissioner*, 28 F.3d 1430,

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[1] Coincidentally, the State Board's Petition for Rehearing asserting the very same arguments that it now presents in this Petition for Certiorari.

1443 (7th Cir. 1994).[2] The State Board then filed its petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH ALL APPLICABLE DECISIONS OF THE COURTS OF APPEAL WHICH DEAL WITH THE AWARD OF FEES IN CONGRESSIONAL REAPPORTIONMENT CASES.

In this congressional reapportionment case, the Seventh Circuit held that those parties whose proposed configurations for Illinois' congressional districts were incorporated into the reapportionment plan adopted by the District Court had "prevailed" for purposes of the attorneys' fee shifting statutes, 42 U.S.C. §§1973 1(e) and 1988. *Hastert*, 28 F.3d 1440-1442. The Seventh Circuit also held that there are no "special circumstances" that would render an award of fees unjust in this case. *Id.*, at 1443-44. The Seventh Circuit's decision in this case was clearly correct and it is consistent with prior decisions where the Courts of Appeal have issued an award of attorneys' fees against the neutral state official or entity responsible for administering the election laws in favor of prevailing parties in congressional reapportionment cases. *See, eg., In Re: Kansas Congressional District's Reapportionment*, 745 F.2d 610 (10th Cir. 1984), *aff'g., O'Sullivan v. Brier*, 540 F.Supp. 1200 (D. Kan. 1982); *In Re: Illinois Congressional District's Reapportionment Cases*, 704 F.2d 380 (7th Cir. 1983); see also *Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993) (awarding fees in lawsuit to reapportion state legislative districts).

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[2] A majority of the judges in active service voted to deny the State Board's Petition for Rehearing en banc. Three dissenting judges voted to grant rehearing.

In the *In Re: Illinois Congressional District's* case, the Seventh Circuit affirmed an award of attorneys' fees against the very same State Board (although it reduced the multiplier applied by the District Court) under circumstances that are indistinguishable from those found in this case. The reapportionment litigation which followed the 1980 census and the instant litigation which followed the 1990 census share several commonalities.[3]

The State Board's suggestion that "this litigation presents the *unaddressed question* of a nominal Defendant's liability for fees when the substantive controversy is only between Plaintiff groups and 'winning Plaintiffs' are identified for their relative success against other Plaintiffs, rather than against the nominal and neutral Defendant" is misleading and inaccurate. Petition at 10-11 (emphasis added). Petitioners have failed to identify any court of appeals decision with which the decision in this case conflicts. The absence of such conflict is sufficient reason to deny the writ. *See Braxton v. United States*, ____ U.S. ____, 111 S.Ct. 1854, 1857 (1991). Granting the writ and reversing the Seventh Circuit's judgment would disrupt well settled law.

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[3] (1) The Illinois State Legislature failed to reapportion the state's congressional district's consistent with the census results; (2) the various parties filed lawsuits seeking to declare Illinois' then existing congressional district configuration unconstitutional and to substitute a court ordered congressional district plan that would comply with the applicable legal criteria; (3) Petitioner State Board conceded, prior to trial, that the existing district plan was unconstitutional; (4) the only issue at trial was which of the parties' competing plans would be chosen; and (5) the lower court held that the parties whose configurations were adopted by the court were "prevailing parties" for the purposes of the attorneys' fee statute. *In Re: Illinois Congressional Districts*, 704 F.2d at 381.

II.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ALL APPLICABLE SUPREME COURT AUTHORITY.

Petitioner State Board also suggests that the Seventh Circuit's decision in this case is at odds with precedent from this Court. According to the State Board, none of the plaintiffs prevailed against the State Board because "the Seventh Circuit made no finding of federal law violation against the defendant, and a litigation resolved only the disputes existing between plaintiffs." Petition, at 12. "Where a Defendant has not been prevailed against, federal fee shifting statutes do not authorize an award against that defendant." Petition, at 11-12 (citing *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 572 (1992); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Petitioner erroneously contends that none of the plaintiffs prevailed against the State Board and thereafter illogicly concludes that the Seventh Circuit errored in the awarding of attorney fees. The State Board's argument is without merit for several reasons. First, there was a violation of federal law for which the State Board should be held accountable. The District Court found that "the Illinois General Assembly failed to undertake its constitutional obligation to devise a new congressional district scheme for the state." *Hastert*, 777 F.Supp. at 637. The District Court further held that "the present congressional district plan is both unconstitutional and impractible due to population and demographic changes represented in the 1990 census." *Id.* It was the state legislature's failure to perform its duty which caused a violation of the United States Constitution. The *Nieves* and *Urban League* plaintiffs clearly prevailed in accomplishing the difficult task of redistricting Illinois, an obligation the State failed to meet.

Sadly, this dereliction of duty was merely the latest chapter in the State of Illinois' consistent history of failing to de-

velop valid congressional reapportionment plans. As the District Court noted:

> "Illinois last formally enacted a congressional redistricting plan in 1961. . . . That apportionment was ruled unconstitutional in *People Ex Rel. Scott v. Kerner*, 32 Ill. 2d 539, 208 N.E. 2d 561 (1965). Despite ample time to devise a constitutional redistricting plan for the 1966 congressional elections, the general assembly avoided the task, leaving the judiciary with a task of adopting one among various provisional plans. . . . In the 25 years since *Kerner*, the Illinois legislature failed to enact a congressional redistricting plan on two separate occasions. As a result, this issue was defaulted to the judiciary (in 1971 and 1981)."

Hastert, 777 F.Supp. at 641 n. 6. *See also Golegrave v. Green*, 328 U.S. 549 (1946) (recognizing the legislatures' failure from 1901 to 1945 to redraw Illinois congressional districts to reflect population changes). This Court has made it absolutely clear that a fee award can be taxed against the State Board, as an enforcer of election laws, despite the fact that it was the State's legislature whose inaction prompted the Plaintiffs' successful lawsuit. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 739 (1980). In *Consumers Union*, this court held that:

> "Fee awards against enforcement officials are run-of-the-mill occurrences, even though on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction." *Id.*

Lower courts have taken this admonition to heart. *See, eg., Hastert*, 28 F.3d at 1444 n. 16 ("fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating"); *Crosby v. Bowling*, 683 F.2d 1068, 1073 (7th Cir. 1982); *O'Sullivan v. Brier*, 540 F.Supp. 1200, 1207 (D. Kan. 1982), *aff'd and re-*

manded, on other grounds; *In Re: Kansas Congressional District's Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984); *Connor v. Winter*, 519 F.Supp. 1337, 1343-44 (S.D. Miss. 1981). Thus, the State Board, "as an agency of the state", may properly be held accountable for the prevailing partys' attorneys' fees.

Second, contrary to the State Board's contentions, the *Nieves* and *Urban League* Plaintiffs were ultimately found to be prevailing parties by the court. Any other conclusion would be unwarranted. The *Nieves* and *Urban League* Plaintiffs fully achieved their objectives when the court determined that the State's existing congressional districts were unconstitutional and ordered the implementation of the reapportionment plan incorporating the *Nieves* and *Urban League* configuration for the State's Hispanic and African-American majority congressional districts. Contrary to the State's assertion, the *Nieves* and *Urban League* Plaintiffs were not litigating a political dispute, but were fighting to protect the voting rights of the Hispanic and African-American communities of Illinois.

III.

THE IMPOSITION OF AN AWARD OF ATTORNEYS' FEES IN THIS CASE DOES NOT CREATE ANY SPECIAL AND IMPORTANT REASONS WHICH WARRANT THIS COURT'S INTERVENTION.

Assuming arguendo that the State Board played a nominal role in this litigation, that alone does not constitute special circumstances to warrant denial of fees to the *Nieves* and *Urban League* plaintiffs.

In its petition, the State Board contends that "the imposition of fees in this matter challenges theoretical and very practical aspects of fee shifting statutes." Petition at 13. The State Board then expressed concern regarding (1) how

the reasonableness of the claimed attorneys' fees will be determined, (2) how the State Board will be able to identify non-compensable hours when it "holds no historical knowledge of the litigation," and (3) the supposed incentive to litigation that will be created because the Plaintiffs may prevail between themselves, without being exposed to an opponent's fees, and still seek attorneys' fees from the State Board. *Id.* In truth, none of the State Board's concerns implicate the theoretical or practical aspects of the fee shifting statutes. Nor do any of their false concerns create any special and important reasons which warrant this court's intervention under Supreme Court Rule 10.1.

With respect to the determination of compensable hours, the District Court will be guided by long-standing Supreme Court precedent. As this Court has held:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate . . . This figure, commonly referred to as the 'lodestar,' is presumed to be the reasonable fee contemplated by §1988."[4]

City of Riverside v. Rivera, 477 U.S. 561, 568 (1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *see also City of Dague v. Burlington*, 112 S.Ct. 2638, 2641 (1992). When determining whether an attorney's time has been reasonably expended in the course of litigation "the relevant issue . . . is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 978

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[4] Both §1988 and §1973 1(e), statutes under which respondents seek attorneys' fees, are construed similarly. *See, eg., Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983).

(1993). These principles are fully applicable to this case and it makes no difference that the State took affirmative steps to not participate in the underlying litigation.

The State Board's second concern, its supposed inability to identify non-compensable hours, cannot be taken seriously. The State Board's purported lack of "historical knowledge of the litigation" was created by its own doing. The State Board was not barred from participating in this litigation; on the contrary, the State Board decided not to participate. *Hastert*, 777 F.Supp. at 639.[5] Second, even though it did not participate in the litigation, the State Board will be free to examine the prevailing parties' fee petitions and supporting materials and to make appropriate objections. Additionally, the District Court (which is fully familiar with the litigation) will ultimately determine the amount of fees awarded to Plaintiffs.

Lastly, the State Board's concern that an award of fees in this case will provide an incentive to litigation because Plaintiffs may litigate against themselves, with no risk, and the State Board will pay the winner's fees is completely misplaced. The sole reason that this litigation occurred is because the Illinois General Assembly failed to fulfill its constitutional duty to reapportion Illinois' congressional districts. The State's dereliction of duty compelled the Plaintiffs to bring a lawsuit in order for the requirements of the Federal Constitution and of Section Two of the Voting Rights Act, 42 U.S.C. §1973 to be satisfied. There is

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[5] Given that the Seventh Circuit had affirmed an award of attorneys' fees in the 1981 congressional reapportionment litigation, and that the existing congressional reapportionment plan under which the State Board was bound by court order to implement was indisputably unconstitutional, it was probable, if not inevitable, from the onset of this litigation that there would be an award of attorneys' fees.

nothing inappropriate in the Plaintiffs having sought relief from the Federal District Court when the State legislature failed to perform its constitutional duty. *See, eg., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).[6]

CONCLUSION

There is no dispute that the *Nieves* and *Urban League* Plaintiffs have been found to be prevailing parties. This fact is irrefuted. The Seventh Circuit, in determining that the *Nieves* and *Urban League* Plaintiffs were prevailing parties for the purpose of the fee shifting statutes, followed well settled caselaw from this Court and other lower Courts by directing the District Court to award fees in this voting rights litigation.[7] The State Board's Petition has failed to establish that the Seventh Circuit's decision is in conflict with any precedent from this Court or any of the Courts of Appeal. Additionally, the State Board has failed to show that this run-of-the-mill voting rights litigation created any special and important reasons which warrant this Court's

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[6] Moreover, the State Board's contention that the plaintiffs face no risk when initiating this litigation is without factual support. No group of plaintiffs was guaranteed an award of attorneys' fees when they filed their respective lawsuits. Only prevailing parties are entitled to receive an award of attorneys' fees and, in fact, those plaintiffs who did not prevail had to absorb their own attorneys' fees and other litigation costs. This risk is inherently born by any Plaintiff that files suit.

[7] Prior to the District Court's opinion, which was reversed by the Seventh Circuit, no other court had denied attorneys' fees to a prevailing voting rights plaintiff under circumstances similar to this case.

intervention. Based upon the foregoing, the State Board's Petition for Certiorari should be denied.

Respectfully submitted,

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